SMART & COMPANY

IBLA 83-95 Decided March 21, 1984

Appeal from a decision of the California State Director, Bureau of Land Management, imposing constraints on the use of public lands in San Gorgonio Pass for the siting of commercial wind energy systems. CA 8960.

Dismissed.

1. Rights-of-Way: Applications

An applicant for a right-of-way waives any right to challenge BLM's rejection of its application when the applicant refuses to reimburse the United States, in accordance with the provisions of 43 CFR 2803.1-1(a)(4) and (10), for the costs calculated by BLM to be attributable to the processing of its application.

APPEARANCES: Ronald S. Cooper, Esq., Los Angeles, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Smart & Company has appealed the July 26, 1982, decision of the California State Director, Bureau of Land Management (BLM), concerning pending applications for rights-of-way to use public lands in the San Gorgonio Pass for the siting of wind turbines to generate electricity. This decision imposed certain constraints on the use of these lands on the basis of BLM's analysis pursuant to section 102(2)(C) of the National Environmental Protection Act, 42 U.S.C. § 4332(2)(C) (1976). An effect of this decision was to prohibit siting of 12 proposed wind turbines on the land for which appellant sought its right-of-way.

In November 1980, appellant applied for a right-of-way (CA 8960) on approximately 70 acres of public land at Windy Point in the San Gorgonio Pass, for the siting of wind turbine generators. By letter dated February 12, 1981, BLM acknowledged receipt of appellant's application and notified appellant that the application would be evaluated in connection with an environmental assessment to be undertaken by BLM in cooperation with the California Energy Commission and the Riverside County Planning Commission.

On August 26, 1981, BLM published notice in the Federal Register of its ongoing consideration of applications for rights-of-way to site wind turbines for the generation of electricity in San Gorgonio Pass. 46 FR 43086 (Aug. 26, 1981). In this notice BLM solicited additional applications, under a filing

deadline of 60 days; stated criteria for the project descriptions to be included with applications; and outlined the environmental analysis and decision process that the agency would follow in processing the applications, including reference to the possibility of competitive bidding in the event of BLM's receipt of two or more applications covering the same site. 1/ The notice further provided:

> Where the authorized officer determines that information supplied by the applicant is incomplete or does not conform to [the Federal Land Policy and Management Act of 1976] or 43 CFR Part 2800 regulations the authorized officer shall notify the applicant of these deficiencies and afford the applicant an opportunity to file a correction. Where a deficiency notice has not been adequately complied with, the authorized officer may reject the application.

46 FR 43086, 43087 (Aug. 26, 1981). Pursuant to this notice, Margaret Smart filed a separate application (CA 11455) on September 25, 1981. While Margaret Smart indicated on her application that it was filed as an individual, Smart & Company has treated her application as one of its own in all subsequent filings.

On January 22, 1982, BLM notified appellant of the agency's need for additional information in support of appellant's application. 2/ On January 29, 1982, appellant responded to BLM, expressing uncertainty as to the type and size of wind turbine it might use in its project. On February 16, 1982, appellant again wrote to BLM, in this regard, to inform the agency that it was "practically assured" of using WECS Tech Corporation 100 KW turbines in its project, rather than the Mehrkam 2 MW wind turbines described in its original application. By letter dated March 23, 1982, BLM informed appellant:

> As you recall, your application required additional information requested in our January 22, 1982 letter. Upon receipt and examination of the information four remaining problems exist. First, the S 1/2 SW 1/4 of Section 24 is not public land. Second, the map of Wind Park No. 1 submitted to BLM on February 2, 1982, showing the location of WTG [wind turbine generator] sites is inconsistent with the area's topography. Third, the development plan submitted does not show the location of WECS tech wind turbine generators mentioned in the narrative of your submittal.

1/ In February 1982, BLM published a "modified-competitive bid" procedure, reserving to the United States "the right to withdraw any tract [covered by an application] from the sale prior to the issuance of a written bid and * * * the right to reject any and all bids." 47 FR 8253 (Feb. 25, 1982). On Mar. 17, 1982, and again, by counsel, on Mar. 23, 1982, appellant wrote to BLM objecting to this bidding procedure. The record does not reveal a response by BLM to appellant's objections in this regard, but in any event the question of the merits of the bidding procedure is not before the Board.

2/ BLM's Jan. 22 letter is not in the record; however, it is referenced in BLM's letter of Mar. 23, 1982, discussed in the text, infra.

> Therefore, BLM will not consider their siting in the EIS [environmental impact statement] or continue to include them as part of your application.

The fourth matter referenced was that BLM had not received a development plan for Margaret Smart's application. Thus, the State Office noted "without this information the Bureau is unable to assess the impacts of the proposal and the application is rejected." Margaret Smart never appealed from this rejection. 3/

With this letter BLM enclosed a bill, totaling $4,750, for the difference between the amount appellant submitted with its initial application, pursuant to 43 CFR 2803.1-1(a)(3)(ii), and BLM's estimated cost of processing the application, as calculated pursuant to 43 CFR 2803.1-1(a)(4) and (10). 4/ Appellant was expressly informed that "if we do not receive your payment within 30 days, we will no longer consider your application."

In response to BLM's letter of March 23, appellant tendered, under protest, a check for 10 percent of the amount of the bill from BLM and a "Customer Draft" for the remainder. Appellant made BLM's negotiation of the draft subject to the conditions: (1) That BLM grant the right-of-way for which appellant had applied; (2) that BLM assure that appellant would be able to site wind turbines on the area covered by the application; and (3) that BLM prove that appellant's application was in competition with other applications for rights-of-way in San Gorgonio Pass. 5/ As to BLM's decision not to consider further applicant's proposed siting of WECS Tech 100 KW turbines, appellant wrote:

> Smart and Company has furnished two Wtg site location plans showing approximate locations of Mehr Kam [Mehrkam] two megawatt

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3/ While appellant's attorney noted, in a subsequent letter, that "Smart and Company strenuously objects to the BLM's rejection of Margaret Smart's application CA 11455," Margaret Smart never appealed, either personally or through a legal representative, the rejection of her "individual" application. Thus, no appeal from the rejection of this application is properly before the Board.

4/ 43 CFR 2803.1-1(a)(1) contains the general requirement:

"An applicant for a right-of-way grant * * * shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347), before the right-of-way * * * shall be issued under the regulations of this title."

The corresponding regulatory provisions cited in the text, supra, require a nonreturnable, initial payment with an application and such additional payments as are necessary to reimburse the United States for processing costs that exceed the amount of the initial payment. These provisions are discussed in detail in the text, infra.

5/ There is not a copy of the "Customer Draft" in the record. The statement of the conditions appearing on the draft is based on information contained in a letter dated Apr. 19, 1982, from Ronald S. Cooper, counsel for appellant, to the Denver Service Center, BLM.

> units. It is still Smart and Company's plan to use these units if they are obtainable. It is our understanding that Mehr Kam Development stands a good chance of being revitalized and will undoubtedly continue to produce the large machines.
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> In addition to the above, Smart and Company has submitted a description of an alternative plan using WECS Tech 100 kw. turbines. It is Smart and Company's intention to use said units only if it cannot obtain the large Mehr Kam [Mehrkam] 2,000 kw machines. In the event scenario one of the generic EIS is adopted, which is the only scenario which allows development of wind resources on the land applied for by Smart and Company, and if Smart and Company has to change to the smaller units, it will gladly accept the BLM's suggestions as to placement locations conforming to topography. It should be noted, however, [that] the Smart and Company's letter of November 1, 1980 shows by parcels indicated on Riverside County Assessor's Maps 522-17 and 522-18 the official boundaries of the lands in question. 6/

On April 20, 1982, BLM returned appellant's conditional payment of the application processing costs on the grounds (1) that BLM cannot accept bank drafts and (2) that BLM cannot accept payments subject to conditions.

In May 1982, BLM issued its draft environmental impact statement (draft EIS) concerning the applications for rights-of-way to generate electricity from wind energy in the San Gorgonio Pass. In this document, BLM identified the basic areas of expressed public concern: aesthetics, safety, noise, electromagnetic interference, ecology, land use, and equitable access to wind. BLM then discussed three alternative courses of action against the background of these concerns: (1) To allow the development proposed in the pending applications; (2) to allow the proposed development except that which would affect public lands having resources "extremely sensitive" to the development; and (3) to allow none of the proposed development. BLM indicated its preference to be alternative 2. Under this alternative, appellant's proposed development on Windy Point would be precluded because that area was considered to be a "distinctive visual landmark."

Appellant submitted comments on the draft EIS and on May 24, 1982, submitted a new development proposal to be considered with its application. Under this proposal appellant would use the previously mentioned WECS Tech 100 KW turbines, which appellant described as "small, quiet units that when painted brown will blend into the landscape." On June 1, 1982, appellant wrote to BLM, providing additional details of its proposed use of the WECS Tech turbines, and an analysis of their use in the particular context of the concerns discussed in BLM's draft EIS. In this communication, appellant suggested that BLM should pursue the first alternative identified in the draft EIS, but contended that its revised development plans would be compatible with the second alternative.

6/ Letter of Apr. 19, 1982, note 5, infra.

BLM published its final EIS at the end of June 1982, therein indicating, again, its preference for alternative 2 and that the agency would consider comments filed no later than July 26, 1982. BLM did not address appellant's revised development proposal in the final EIS. 7/

On July 6, 1982, appellant wrote to BLM to request that its revised development plan be incorporated in BLM's final decision. On July 26, 1982, BLM issued its decision document adopting alternative 2 as set forth in the final EIS. Smart & Company seeks to appeal this decision.

[1] In its statement in support of its appeal, Smart & Company contends that the constraints imposed by BLM on the siting of wind turbine generators in the San Gorgonio Pass are arbitrary and capricious. The Board does not address this contention because, as is explained below, it holds that appellant waived any right to challenge the merits of BLM's decision by its refusal to pay the United States for the costs calculated by BLM to be attributable to the processing of appellant's application for a right-of-way.

An applicant for a right-of-way must pay the United States for all the costs of processing the application before the applicant can be granted the right-of-way. 43 CFR 2803.1-1(a)(5). The applicant must submit a nonreturnable processing fee with its application, based on the geographical extent of the right-of-way covered by the application. 43 CFR 2803.1-1(a)(3). The applicant must also pay the United States the amount of any processing costs that exceed this initial fee, whether or not the application is granted by BLM. 43 CFR 2803.1-1(a)(5) through -1(a)(7). Upon its receipt of an application BLM is to estimate the processing costs and, if these costs are expected to exceed the initial fee by an amount greater than the cost of maintaining actual cost records, BLM is to require payment of the excess before it incurs the costs. 43 CFR 2803.1-1(a)(4). When the processing costs incurred or expected to be incurred by BLM are not readily identifiable with a single application, the agency is to allocate the costs among the affected applicants in equal shares. 43 CFR 2803.1-1(a)(10). This is the procedure that BLM followed with respect to the costs of the environmental analysis it performed in processing the various applications for rights-of-way to site wind turbine generators on public land in San Gorgonio Pass. 8/

When an applicant for a right-of-way disagrees with the amount of the cost calculated by BLM to be attributable to the processing of an application, the proper course of action for the applicant is to pay the assessment under protest, so that it may be further reviewed by BLM and, if necessary, this Board. If an applicant, instead, merely refuses to pay the assessment, the applicant deprives BLM of authority to further process the application

7/ BLM did publish in the final EIS, at page 28, a letter from appellant that contains various criticisms of the draft EIS and the contention that BLM should proceed with development as outlined in alternative 1 of that document. BLM's comment on this letter merely refers to earlier materials submitted by appellant that BLM addressed in the "joint environmental document."

8/ BLM explained its allocation of the costs of environmental analysis in its letter to appellant dated Mar. 23, 1982.

or, if the processing has been completed, to grant the right-of-way sought by the applicant. This necessarily results since, under the provisions of 43 CFR 2803.1-1 discussed above, BLM is required to obtain payment from an applicant of significant processing costs before incurring them and, in any event, BLM must receive payment of all processing costs before it grants a right-of-way.

In the instant case appellant conditioned its payment of the processing costs assessed by BLM, inter alia, on BLM's granting of the right-of-way sought by appellant. Appellant had been expressly advised by BLM that failure to pay the assessed processing costs would result in no further consideration being given to its application. Tender of payment in a form which precludes acceptance is the legal equivalent of a failure to pay at all. See Mesa Petroleum Co., 37 IBLA 103 (1978). The conditional nature of the payment precluded BLM from further processing appellant's application and, thus, effectively terminated appellant's status as an applicant for a right-of-way. Having forfeited its status as an applicant, appellant cannot now be heard to challenge BLM's decision concerning the granting of rights-of-way to site wind turbine generators in San Gorgonio Pass, for appellant no longer has any legally recognizable interest adversely affected by BLM's decision. 9/

9/ Under 43 CFR 4.410, there are two substantive prerequisites to the prosecution of an administrative appeal before this Board: (1) That the appellant be a "party to the case," and (2) that the appellant be "adversely affected" by the decision appealed. E.g., In re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982). Appellant became a party to the instant case as an applicant for a right-of-way, and, as an applicant, appellant had an interest -- the prospect of being granted a right-of-way -- that could be adversely affected by BLM's decision concerning the granting of rights-of-way on public lands in San Gorgonio Pass. It may be said that appellant has remained a party to the case by its participation in the public evaluation of BLM's environmental analysis. But when appellant refused to pay BLM's costs of processing its application, and thereby terminated its applicant status, appellant's interest in BLM's decision process became too remote, as a matter of law, to support a formal challenge of BLM's decision by appeal. This limitation is manifested in the fact the relief sought by appellant, to be granted the right-of-way covered by its application, cannot be granted by the Board under the circumstance of appellant's refusal to prepay the costs of processing its application.

A basic element of the doctrine of judicial standing is that the claimant must allege facts showing a substantial likelihood that the "relief requested will prevent or redress the claimed injury." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 79 (1978). While we have in previous decisions acknowledged that the requirements of administrative standing and those of judicial standing are not necessarily congruent, e.g., In re Pacific Coast Molybdenum Co., supra at 331, we discern no sound reason to depart so far from the restrictions recognized by the courts as to devote the Board's resources to addressing issues at the request of an appellant who can no longer allege more than an abstract interest in their resolution.

For the foregoing reasons, and pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

James L. Burski
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Will A. Irwin
Administrative Judge